Supreme Court, U. S.
FILED
SEP 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-335

ANDREW WILLIAMS,

Petitioner,

v.

WILLIAM J. USERY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HOWARD S. SCHER
LESTER SCALL
Migrant Legal Action Program, Inc.
1910 K Street, N.W.
Washington, D.C. 20006
(202) 785-2475

MICHAEL R. MASINTER
Florida Rural Legal Services, Inc.
P.O. Box 1529
Homestead, Florida 33030

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION OF LAW PRESENTED	2
STATUTORY AND REGULATORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. REVIEW BY THE COURT IS NECESSARY TO RECTIFY THE IMPROPER ADMINISTRATION OF THE IMMIGRATION LAW SO AS TO EFFECTUATE ITS PURPOSE OF PROTECTING DOMESTIC LABOR	6
A. Introduction	6
B. The Statutory and Regulatory Scheme	7
C. Congressional Policy Concerning Domestic Labor Preference	8
D. The "Adverse Effect Wage Rate"	11
CONCLUSION	15
APPENDICES	
A. The Opinion of the United States District Court	1a
B. The Opinion of the United States Court of Appeals	1b
C. The Order of the United States Court of Appeals Denying the Petition for Rehearing with Suggestion for Rehearing *en banc*	1c
D. Statutes and Regulations	1d

TABLE OF AUTHORITIES

Cases: *Page*

Acupuncture Center of Washington v. Dunlop, ____ F.2d ____ (D.C. Cir. 1976), *pet.* for *cert.* filed April 15, 1976 (No. 75-1497) 10,11

Digilab v. Secretary of Labor, 495 F.2d 323 (1st Cir. 1974) 10

Elton Orchards, Inc. v. Brennan, 508 F.2d 493 (1st Cir. 1974) 9

Florida Sugar Cane League, Inc. v. Usery, Case No. WPB-75-138-Civ.-CF (S.D. Fla. August 11, 1975), *aff'd.*, 531 F.2d 299 (5th Cir. 1976) 4,5

Galan v. Usery, No. 76-1019 (D.C. Cir., Appeal Pending) 13

Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969) 10

NAACP, Western Region v. Brennan, 360 F. Supp. 1006 (D.D.C. 1973) 10

Ozbirman v. Regional Manpower Administrator, U.S. Dept. of Labor, 335 F. Supp. 467 (S.D.N.Y. 1971) 11

Pesikoff v. Secretary of Labor, 501 F.2d 757, *cert. denied*, 419 U.S. 1038 (1974) 10,11,13

Williams v. Usery, 531 F.2d 305 (5th Cir. 1976) 6,13

Statutory and Regulatory Provisions:

8 C.F.R. §214.2(h)(3) 8

20 C.F.R. §§602-602.10b 5,8,12,13

5 U.S.C. §702 5

5 U.S.C. §706 5

8 U.S.C. §1101 *et seq.* 6

8 U.S.C. §1101(a)(15)(H)(ii) 7

8 U.S.C. §1182(a)(14) 8,9,10,11

Page

8 U.S.C. §1184(c) 7,9

28 U.S.C. §1337 4

28 U.S.C. §1361 5

29 U.S.C. §49 *et seq.* 8,9,12

Texts and Hearings:

Farm Labor (United States Department of Agriculture, August 25, 1975) 4

41 Fed. Reg. 25017, June 22, 1976 12

Hearing Before the Florida Agricultural Stabilization and Conservation Service, Wage and Price Hearing, Belle Glade, Florida (May 23, 1974) 14

Hearing Before the Subcommittee on Agricultural Labor of the House Committee on Education and Labor, 94th Cong., 1st Sess., 197 (1975) 3

Kramer, *The Offshores: A Study of Foreign Farm Labor in Florida* (Community Action Fund, Inc., St. Petersburg, Florida, 1966) 13

Report of the President's Commission on Migratory Labor, 1951, *Migratory Labor in American Agriculture* 9

S. Rep. No. 748, 89th Cong., 1st Sess. (1965) U.S. Code Cong. and Admin. News, p. 3318 9

1952 U.S. Code Cong. and Admin. News 1653 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

ANDREW WILLIAMS,

Petitioner,

v.

WILLIAM J. USERY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, ANDREW WILLIAMS, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on May 10, 1976, petition for rehearing with suggestion for rehearing *en banc* denied on June 8, 1976.

OPINIONS BELOW

The order of the United States District Court, Fulton J., denying preliminary injunctive relief was an oral order entered on the 15th day of August, 1975.

The order of the district court, dated September 22, 1975, is attached to this petition as Appendix A.

The opinion of the Court of Appeals reported at 531 F.2d 305 (5th Cir. 1976), is attached as Appendix B. The order of the Court of Appeals, on petition for rehearing with suggestion for rehearing *en banc*, is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1976. A timely petition for rehearing with suggestion for *en banc* consideration was denied by the lower court on June 8, 1976. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION OF LAW PRESENTED

Is it a subversion of the intent of the immigration law which states that domestic labor is to be protected from job displacement by foreign labor when petitioner, an American desiring to cut sugarcane in Florida, and others like him, remain unemployed because of their replacement by a nearly total foreign cane cutting force?

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions involved in this case are set forth in Appendix D:

1. 8 U.S.C. §1101(a)(15)(H)(ii).
2. 8 U.S.C. §1182(a)(14).
3. 8 U.S.C. §1184(c).
4. 29 U.S.C. §49 *et seq.*
5. 8 C.F.R. §214.2(h)(3).
6. 20 C.F.R. §602.1-602.10b.

STATEMENT OF THE CASE

This petition seeks to rectify the employment situation in the cutting of sugarcane in South Florida, a situation which is contrary to federal law and policy. Growers there have institutionalized[1] the annual importation of temporary foreign labor to cut their cane. The number of workers they employ are substantial: 1,000 to cut seed cane and 8,500 to cut harvest cane. This institutionalization exists even though such jobs were once performed exclusively by domestic labor and even though Americans presently are available to do this work. These Americans, one of whom is the petitioner, remain unemployed.[2]

[1] The Department of Labor describes the employment of foreign workers in Florida cane cutting as "a system [that] has become *institutionalized* for employing only male foreign sugar harvest workers." (Emphasis added). Department of Labor Study of Florida Sugar Cane Industry in Hearing Before the Subcommittee on Agricultural Labor of the House Committee on Education and Labor, 94th Cong., 1st Sess., 197 (1975).

[2] Actually, there were 44 domestic workers employed cutting cane in 1975.

Petitioner is a farmworker who grew up on an Alabama sugarcane farm. He has previously cut cane in the Louisiana fields where the labor force was – and still is – totally domestic. Petitioner has been willing, able and qualified to work as a cane cutter in Florida but for the exceedingly low wages offered there; the foreign workers now harvesting cane in Florida are employed at wages substantially lower than the prevailing wages for American field workers in all other locally grown crops.[3] Petitioner will argue that, but for the fact the sugarcane growers have a ready supply of foreign labor willing to work at wages unacceptable to Americans, the growers would have to hire petitioner and other Americans at decent wages. He will further argue that the displacement of American workers results from the improper administration of federal law and regulations governing the protection of domestic labor. The federal officers ultimately responsible for the enforcement of this federal policy are the Secretary of Labor (Secretary) and the Commissioner of the Immigration and Naturalization Service (Commissioner).

Petitioner filed the complaint in this case on August 13, 1975, two days after the denial of his motion to intervene at the district court level in the case of *Florida Sugar Cane League, Inc. v. Usery*, Case No. WPB-75-138-Civ-CF (S.D. Fla. August 11, 1975) *aff'd*, 531 F.2d 299 (5th Cir. 1976). Jurisdiction was invoked under 28 U.S.C. §1337 (Acts of Congress regulating

[3] As to prevailing wage rates in other Florida crops, figures published by the United States Department of Agriculture in *Farm Labor* (Aug. 25, 1975) reveal that piece-rate workers averaged $3.21/hour in April, 1975, and $3.32/hour by July of 1975.

commerce); 28 U.S.C. §1361 (Compelling Performance); 5 U.S.C. §§702, 706 (Administrative Procedure Act). On August 15, 1975, petitioner's motion for a preliminary injunction was heard and orally denied. On September 12, 1975, petitioner filed a notice of appeal and motion for expedited appeal from the oral order. On September 22, 1975, the district court entered its written order.

Petitioner's complaint and the appeal to the Fifth Circuit attacked the Secretary's failure to follow the regulations set forth at 20 C.F.R. §§602.10-602.10b involving the certification of the growers' stated need for temporary foreign labor. In addition, petitioner filed an *amicus curiae* brief in the companion case of *Florida Sugar Cane League, Inc. v. Usery, supra*, in which the petitioner asserted that a wage rate set out by the Secretary in 20 C.F.R. §602.10b – known as the adverse effect wage rate[4] – was too low to attract domestic workers. While the Fifth Circuit recognized that Williams had not raised this issue on the appeal in the case *sub judice*, it noted that the issue had been raised in his *amicus curiae* brief filed in *Florida Sugar Cane League, Inc. v. Usery*.[5] Because, the Court stated,

[4] Discussed, *infra*, Subsection D.

[5] At the preliminary injunction stage in the trial court, it had not been petitioner's intention to present evidence concerning the adequacy or "attractiveness" to Americans of the adverse effect wage rate. Rather, petitioner simply intended to show a failure by the Secretary to follow regulations when he set the rate. Petitioner's appeal to the Fifth Circuit dealt only with the issue decided below and he could not foresee that the Appeals Court, even though it consolidated cases, would, by its decision, foreclose a later development of the "attractiveness" issue in the trial court.

the issue fit more logically within the confines of the *Williams* case, it decided the issue in *Williams.* See, 531 F.2d at 306. The Fifth Circuit affirmed the judgment of the Court below on May 10, 1976, finding against Williams on all issues asserted in his appeal as well as on the issue of attractiveness raised in his *amicus curiae* brief. A petition for rehearing with suggestion for rehearing *en banc* was timely filed and denied on June 8, 1976. The Fifth Circuit's decision reached the merits on all issues which petitioner raised or could have raised in the district court. Therefore, this Petition for writ of certiorari was timely filed. It seeks review from the Court of Appeals' decision that the

> "regulations and procedures used by the Secretary, in the absence of specific statutory standards, appear reasonably suited to achieve the statutory purpose of guarding against a general wage deflation from the employment of foreign workers." 531 F.2d at 307.

REASONS FOR GRANTING THE WRIT

I. REVIEW BY THE COURT IS NECESSARY TO RECTIFY THE IMPROPER ADMINISTRATION OF THE IMMIGRATION LAW SO AS TO EFFECTUATE ITS PURPOSE OF PROTECTING DOMESTIC LABOR

A. Introduction

At issue in this case is the question of whether the Immigration and Nationality Act (INA),[6] and related

[6] 8 U.S.C. §1101 *et seq.*

laws and regulations, are being administered to achieve their stated purpose: the protection of domestic workers. The statutory and regulatory scheme[7] was intended to be a national program, involving, first, the interstate recruitment of domestic labor and, finally, only when such labor was found to be unavailable, a resort to the importation of temporary foreign labor.

B. The Statutory and Regulatory Scheme

The INA permits the admission of aliens to serve as temporary agricultural labor if domestic workers are not available. The INA defines as a "non-immigrant" an alien who ". . . is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country. . . ." 8 U.S.C. §1101(a)(15)(H)(ii). Non-immigrants thus defined may be admitted upon a determination by the Attorney General after "consultation with appropriate agencies of the government" that the pertinent requirements are satisfied. 8 U.S.C. §1184(c). This determination is in fact delegated to the Immigration and Naturalization Service. The INA requires that an employer's petition for the admission of non-immigrant aliens to perform temporary service be accompanied by ". . . a certification from the Secretary of Labor . . . stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely effect the wages and working conditions of

[7] Discussed, *infra,* subsection B.

workers in the United States similarly employed, or a notice that such certification cannot be made. . . ." 8 C.F.R. §214.2(h)(3); see also, 8 U.S.C. §1182(a)(14).

The Labor Department regulations at 20 C.F.R. §§602-602.10b[8] empower the regional Employment Training Administrator (of the Department of Labor) to issue the certification required by the Immigration regulations. He, like the Immigration and Naturalization Service, may issue the certification if he finds that U.S. workers would not be adversely affected. In addition, this Labor Department official must find that

> ". . . reasonable efforts have been and will continue to be made by the [state] employment service and the employers to obtain domestic workers . . . to perform the work for which the services of temporary foreign workers are requested, and for which domestic workers are not available." 20 C.F.R. §602.10(d)(2).

C. Congressional Policy Concerning Domestic Labor Preference

While the language of this statute and supporting regulations are clear enough concerning the intended national policy to give preference to domestic labor, Congressional statements in the legislative history and Court decisions make this policy clearer still.

[8] Regulations promulgated pursuant to a related statute, the Wagner-Peyser Act, 29 U.S.C. §49 *et seq.*, provide first for state agency placement of local workers with local agricultural employers. 20 C.F.R. §602.8. If local workers are not available, an Interstate Clearance System for recruitment of agricultural workers may be used to recruit, through other state agencies, workers available in other states. 20 C.F.R. §§602.2 and 602.9.

In 1951, conclusive evidence was uncovered that temporary foreign labor was being used to displace American labor and that such foreign labor tended to depress wages and working conditions. See the Report of the President's Commission on Migratory Labor, 1951, *Migratory Labor in American Agriculture*, chaps. 3, 6, and 7. The following year Congress passed Section 214(c)[9] of the INA to counter this problem. The legislative history of this Section states that "certain alien workers," among them agricultural workers, may be admitted temporarily ". . . for the purpose of alleviating labor shortages . . ." 1952 U.S. Code Cong. and Admin. News 1653, 1697-1698. In 1965, Congress amended a related provision of the INA, 8 U.S.C. §1182(a)(14) and, in the legislative history of that amendment, restated and refined its intention to give preference to American workers. This history stated that the Secretary of Labor would be required to make "an affirmative finding" that any alien seeking entry to this country to work "will not replace" an American worker and will not "adversely affect the wages and working conditions" of others similarly employed here. S. Rep. No. 748, 89th Cong., 1st Sess., 24, (1965) U.S. Code Cong. and Admin. News 3342.[10]

Courts have held that the central policy behind the INA and the related provisions of the Wagner-Peyser Act is "the desire to protect domestic workers." *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493, 499 (1st Cir.

[9] 8 U.S.C. §1184(c).

[10] The legislative history also states that newly amended §1182 would, within the scope of certification, have ". . . the effect of excluding any intending immigrant who would *likely displace* a qualified American worker . . ." (Emphasis added.) 1965 U.S. Code Cong. and Admin. News at 3333.

1974); *Digilab v. Secretary of Labor*, 494 F.2d 323, 326 (1st Cir. 1974); *Gomez v. Florida State Employment Service*, 417 F.2d 569, 571, 575-76 (5th Cir. 1969); *NAACP, Western Region v. Brennan*, 360 F. Supp. 1006 (D.D.C. 1973). Stated another way, immigration policy is that domestic workers rather than aliens be employed wherever possible. *Elton Orchards, supra*, at 500; *Pesikoff v. Secretary of Labor*, 501 F.2d 757, *cert. denied*, 419 U.S. 1038 (1974); and *Acupuncture Center of Washington v. Dunlop*, ____ F.2d ____ (D.C. Cir. 1976), *petition for cert. filed* April 15, 1976 (No. 75-1497). *Pesikoff, supra*, stressed that 8 U.S.C. §1182(a)(14) "is written so as to set up a presumption that aliens should not be permitted to enter the United States for the purpose of performing labor because of the likely harmful impact of their admission on American workers." To prevent any harmful impact, *Pesikoff* required the Secretary, at least, to examine the general market data readily available to him to see whether it indicates a pool of potential workers available to perform the job which the alien seeks. The burden should then be placed on the alien or his putative employer to prove that it is not possible for the employer to find a qualified American worker – that is, one able, willing, and qualified to work at that particular job.

In *Acupuncture Center, supra*, the same court, with respect to the Secretary's duties in the certification process, stated:

> His task . . . is simply to locate "a class of workers who, while possibly not meeting the prospective employer's personalized job description, do provide the employer with the potential for getting his job accomplished." [Citing *Pesikoff v. Secretary of Labor*, 501 F.2d at 762.] At _____.

Both *Pesikoff* and *Acupuncture Center* placed the burden on the employer to prove that the available labor market was unable to fill the employer's needs. In addition, it is significant that the labor market identified by the Secretary contained persons whose qualifications did not meet all of the employer's stated requirements. Nevertheless, the qualifications possessed by the members of the pool permitted the Secretary to say that the workers possessed the *potential* for getting the employer's job accomplished. In both cases, the Court rejected challenges to the Secretary's denial of certification of a foreign worker.[11]

Here, the Secretary of Labor allowed an overwhelming use of foreign labor in the face of petitioner's, and other widespread American, unemployment. Such a use of the foreign labor certification program, petitioner will argue, must be contrary to the intent of Congress and should be overturned by this Court.

D. The "Adverse Effect Wage Rate"

The process for admission of temporary foreign labor also requires the Secretary to certify that the employment of such aliens will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. 8 U.S.C. §1182(a)(14)(B).

---

[11] "The labor certification procedure was not designed to cater to the personal quirks of an employer. . . ." *Ozbirman v. Regional Manpower Administrator, U.S. Dept. of Labor*, 335 F. Supp. 467, 474 (S.D.N.Y. 1971) [Cited as footnote 10 in *Pesikoff* at 762, 763.]

As a result, the Secretary promulgated the regulation at 20 C.F.R. §602.10b which sets forth the "adverse effect wage rate" (AEWR).[12] His stated reason for setting an AEWR is to ameliorate the "adverse effect" occasioned by the presence of temporary foreign workers in agricultural labor.[13] Theoretically, then, the AEWR prevents an employer from driving down domestic wages; without the AEWR, foreign labor would be available at a lower cost than prevailing domestic wages.

At the same time, however, the Secretary does not require a grower (employer) to offer or guarantee to domestic workers recruited through the interstate recruitment process *higher* wages than the AEWR.[14] The Secretary, in other words, does not require a grower to negotiate with any domestic workers.

This process does not determine the general availability of farmworkers but rather the availability of

[12]Nowhere in the statutory scheme, either in the INA or in the Wagner-Peyser Act, is there a requirement that an adverse effect wage rate be set. It is clear that the setting of that rate is purely an administrative interpretation of the Secretary in performing his functions in the certification process.

[13]See, e.g., 41 Fed. Reg. 25017, June 22, 1976.

[14]Oddly enough, in sugarcane, where piece-rate payment prevails, Jamaican workers often earn an amount which, when converted into hourly earnings, exceeds the AEWR. See, e.g., the stipulation entered into in the district court between petitioner and the Secretary of Labor that the *average* wage paid to *foreign* workers in the 1974-75 harvest was $3.03/hour. One season later, 1975-76, when this action was filed, the AEWR was still only $2.84 per hour.

workers at a single specific wage rate.[15] This process removes the burden which Congress intended to place on the employer to prove that it is not possible for the employer to find a qualified domestic worker. See *Pesikoff v. Secretary of Labor* at 761.

Petitioner will argue that, if an AEWR is set, its function should be to attract domestic labor to do the job offered. In contrast, the Fifth Circuit held, 531 F.2d at 307, that:

> "Attractiveness" is the wrong test for measuring the Secretary's determination [of the adverse effect wage rate].

This decision is contrary to policy established by prior Secretaries of Labor. See, Kramer, *The Offshores: A Study of Foreign Farm Labor in Florida* (Community Action Fund, Inc.; St. Petersburg, Florida, 1966), pp. 3, 85. Former Labor Secretary, W. Willard Wirtz, in a statement prepared for the study, said:

> With the rise in employment has come an increased effort to *attract* and hold domestic workers. One of the most striking examples is the effort made by the Florida citrus industry. The

[15]See *Galan v. Usery*, No. 76-1019 (D.C. Cir., Appeal Pending). In *Galan*, appellants (Puerto Rican domestic workers) were available to harvest apples in the Northeast and mid-Atlantic states at terms slightly more onerous than required by the Secretary in 20 C.F.R. §§602.10-602.10b. The Secretary argued that the additional terms, above the minimums established in the regulations, required the ruling that Puerto Rican workers were not available domestic workers. Such a position is totally contrary to the concept that the AEWR should represent a minimum requirement and totally subverts the protection guaranteed to domestic workers in the INA.

growers there made the basic decision to do their best in recruiting Americans; they devised and we authorized an *attractive* piece-rate and crew-average schedule in place of the criteria wage-floor. Data from November 1, 1965 through March 15, 1966 indicates that the average earnings for citrus-harvest workers were almost $2 an hour, about 95 cents an hour more than citrus wages from January 1 to September 1, 1964. At the peak of the harvest this year, there were 5,800 more domestics working in citrus than at the peak last year. This is one striking example of the results that have been achieved by limiting the number of foreign workers admitted. (Emphasis Added.) *Id.*, at 85.

In his brief to the Fifth Circuit, petitioner pointed to this change in the composition of the citrus work force with the following statement from the Acting Deputy Administrator of the U.S. Employment Service:

> I would further like to note that the citrus industry once also depended heavily upon the availability of foreign workers to accomplish the harvest. In the past six or seven years, they have managed to do this job with a completely domestic work force.
>
> While we do not have complete data for recent years, wage surveys conducted by the Florida State Employment Service during the current and past completed seasons indicated that harvest workers were averaging close to $4.00 an hour in earnings. I would suggest that rising wages have played a role in this increasing utilization of domestic workers.[16]

[16](Statement of David O. Williams, Hearing Before the Florida Agricultural Stabilization and Conservation Service, Wage and Price Hearing, Belle Glade, Florida, May 23, 1974.)

The Appeals Court failed to reckon with this evidence and, by its decision, denied petitioner an opportunity to develop a full record on this issue.

In the face of a complete displacement of domestic labor by foreign workers in Florida cane cutting, the only conclusion possible is that the AEWR (as presently set and utilized) causes the depression of wages in that industry.

CONCLUSION

This petition presents important issues regarding the welfare of domestic agricultural workers. In view of the Secretary of Labor's total subversion of INA policy to protect domestic labor from unfair competition of foreign labor which has resulted in the near total displacement of domestic labor from Florida sugarcane cutting, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

HOWARD S. SCHER
LESTER SCALL
Migrant Legal Action Program, Inc.
1910 K Street, N.W.
Washington, D.C. 20006
(202) 785-2475

MICHAEL R. MASINTER
Florida Rural Legal Services, Inc.
P.O. Box 1529
Homestead, Florida 33030

HANNA COHN (Law Student)
Washington, D.C.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

FILED by ____ D.C.
SEP 22 1975

ANDREW WILLIAMS, individually and on behalf of all others similarly situated, Plaintiff, v. JOHN T. DUNLOP, in his capacity as Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR; WILLIAM H. KOLBERG, in his capacity as Assistant Secretary for Manpower; and WILLIAM B. LEWIS in his capacity as Associate Manpower Administrator for the UNITED STATES EMPLOYMENT SERVICE: and COMMISSIONER OF IMMIGRATION AND NATURALIZATION SERVICE; and EDWARD SWEENEY, in his capacity as District Director of Immigration and Naturalization Service, Defendants.	CIVIL ACTION NO. WPB 75-167 Civ. CF
FLORIDA SUGAR CANE LEAGUE, INC., Plaintiff, v. JOHN T. DUNLOP, in his capacity as Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR; WILLIAM H. KOLBERG, in his capacity as Assistant Secretary for Manpower, and WILLIAM B. LEWIS, in his capacity as Associate Manpower Administrator for the UNITED STATES EMPLOYMENT SERVICE, Defendants.	CIVIL ACTION NO. WPB 75-138 Civ. CF

ORDER OF CONSOLIDATION AND DENYING MOTION FOR PRELIMINARY INJUNCTION

This matter came on for hearing on plaintiff Williams' motion for a temporary restraining order on August 15, 1975, at West Palm Beach, Florida. The defendants appeared through their counsel. Accordingly, the motion for temporary restraining order was denied and the matter proceeded as a motion for preliminary injunction. The Court, having heard the evidence, makes the following findings of facts and conclusion of law.

1. Plaintiff is an American citizen who has worked as a migrant farmworker for the past twenty-five years.

2. Defendants are John T. Dunlop, Secretary of Labor, William H. Kolberg, Assistant Secretary for Manpower, William B. Lewis, Associate Manpower Administrator for the United States Department of Labor, Leonard F. Chapman Jr., Commissioner of the Immigration and Naturalization Service and Edward Sweeney, District Director of the Immigration and Naturalization Service.

3. In Civil Action No. WPB 75-138 Civ. CF, plaintiff is a non-profit Florida corporation, including as members Florida sugar cane growers and processors who seek certification from the United States Department of Labor for the importation of temporary foreign agricultural labor for employment in the task of sugar cane cutter. By Order dated August 11, 1975 this Court denied the League's motion for a preliminary injunction which sought to enjoin the Secretary from adopting and implementing an adverse effect rate of $2.84 per hour applicable to employment in Florida sugar cane, pursuant to 20 CFR §602.10b. (See 40 Federal

Register at pages 34336, 34337 (August 15, 1975).) There the charge was made by the growers that the adverse effect rate was too high, the League having urged that the rate should not exceed $2.60 per hour. Plaintiff Williams, a farmworker represented by Florida Rural Legal Services, Inc., and Migrant Legal Action Program, filed a motion to intervene in the *League* case contending that the adverse effect rate of $2.84 per hour is inadequate because that rate is not "... *attractive* to [plaintiff and to other] United States workers similarly employed and which will not adversely affect the wages and working conditions of [plaintiff and other] United States workers similarly employed." (See ¶1 page 1 of the Williams' motion to intervene in Civil Action WPB 75-138 Civ. CF.)

His Motion to Intervene in the *League* case was denied by this Court by Order entered August 11, 1975. The substance of that motion is now before the Court as the complaint commencing the *Williams* case. In this case the League has moved to intervene. Inasmuch as counsel for the respective intervenors were present in court during the hearings held in these two cases, the court hereby Orders the two cases (Nos. 138 and 167) consolidated *sua sponte* for purposes of all further proceedings.

4. The testimony received at the hearing on the *Williams'* Motion for Preliminary Injunction established that there are more than 20,000 unemployment compensation claims pending in the Palm Beach district, that several thousand of these claims involve supplemental unemployment assistance for farmworkers, that the sugar cane growers have made extensive efforts to recruit domestic sugar cane cutters at $2.60 per hour in Florida through the use of four recruiting teams,

newspaper advertisements, radio and television announcements, and billboards. Only 248 domestic workers responded to this recruitment effort by the growers. Of those domestic workers responding, 17 were determined not to be qualified, 78 refused the employment offered, 153 accepted the employment, 146 were provided bus tickets purchased by the growers for the purpose of providing transportation to the place of employment, 110 of the persons accepting employment did not arrive for employment, 43 workers arrived, 4 were rejected by the growers for medical reasons, 39 workers were actually employed and 32 workers were working as of the date of the hearing (August 15, 1975). In addition, 16 workers presented themselves for employment; 12 remained employed as of the date of the hearing.

Plaintiff Williams testified that except for a 5 year period that he spent in the Army he has done farm work most of his life and has worked and lived in the Belle Glade, Palm Beach, Florida, area for about the last 20 years or more. He has worked as a hand harvest laborer in various fruit and vegetable crops and has worked in sugar cane in various States including Florida. Plaintiff stated he much prefers the job of tractor driver, as cutting sugar cane is very hard work. The Plaintiff is not interested in taking employment in Florida sugar cane at the adverse effect rate of $2.84 per hour, but would consider cutting cane at $3.50 per hour. Plaintiff is currently "seasonally unemployed" and has "applied for farm worker unemployment compensation". See ¶2. page 3 of the *Williams* complaint.

5. The Secretary of Labor on August 12, 1975, the same day the $2.84 adverse effect rate was finalized,

certified to the Commissioner of the Immigration and Naturalization Service that there were not sufficient domestic workers available to cut seed cane in Florida and that the employment of temporary foreign workers would not adversely effect the wages and working conditions of Florida workers similarly employed. Plaintiff seeks to enjoin and restrain the Immigration and Naturalization Service from granting visas in reliance upon the Secretary of Labor's certification. The certification involved presently affects approximately 1000 workers who would be employed in cutting seed cane. It is anticipated that an additional 8000 cane cutters will be needed for the harvest season commencing in late October and running through April of 1976. The continuing open recruitment of domestic workers is going forward at the applicable adverse effect rate of $2.84 per hour.

6. Preliminarily it must be observed that the growers' job orders for sugar cane cutters filed with the Florida State Employment Service (see 20 CFR §602.12) for the purpose of recruiting domestic workers as a condition precedent to the Secretary of Labor's determination of availability and adverse effect are *continuing* job offers. This means that so long as temporary foreign workers are employed in Florida as sugar cane cutters, any qualified domestic workers who desire such employment must be given such employment as a condition of the certification for foreign workers. This is a requirement by the Secretary of Labor to effectuate the purpose of protecting domestic workers, mandated by the Immigration and Nationality Act. See *The Elton Orchards Inc. v. Brennan*, 508 F.2d 493 (1st Cir. 1974). As this court noted in the August 11, decision in the *League* case, the Secretary of

Labor's responsibility in this case derives from the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*). Section 1184(c) provides that the admission of temporary foreign workers ". . . shall be determined by the Attorney General, after consultation with the appropriate agencies of the Government, upon petition of the importing employer." The *manner* by which the Attorney General consults other agencies in the case of temporary foreign workers in agriculture is specified in 8 CFR 214.2(h)(3). The *means* by which the Secretary of Labor responds to the Attorney General is a certification: that domestic workers are not available and that the importation of foreign workers will not adversely affect domestic workers similarly employed, or a statement that such a certification cannot be made.

7. The Secretary of Labor has promulgated enabling regulations appearing at 20 CFR 602.10, a and b, to fulfill duties placed upon him by the Attorney General's regulations. Section 602.10b(a)(1) of the Secretary's regulations provides for the establishment of an "adverse effect rate" designed to protect domestic workers similarly employed (8 CFR 214.2(h)(3)) from the adverse effect that the *presence* of foreign workers may have in the area where domestic workers are employed. See *NAACP v. Brennan*, 360 F.2d 1006, 1020 [Appendix A. ¶8] (D. D.C. 1973).

8. Neither the statute nor the regulations establish any formula for computation of an "adverse effect rate." Accordingly, the determination of the adverse effect rate is addressed to the sound discretion of the Secretary whose decision appears in the Federal Register, Vol. 40 at pages 34336, 34337 (August 15, 1975). As noted above, this court sustained the Secretary's establishment of the current adverse effect

rate against attack by the Florida Sugar Cane League, Inc., in the Order dated August 11, 1975. Paragraph 14 of the Order concluded that "the Secretary identified the competing interests between employer, and employee, and the public interests and struck the required balance to accomplish the *objective of preventing an adverse impact on domestic workers that the presence of foreign workers may otherwise have.*" Plaintiff Williams now attacks that adverse effect rate on the ground that the rate is not high enough to "attract" domestic workers. Such an attack completely misinterprets the meaning and purpose of the phrases "adverse effect" and "adversely affect" used in regulations 20 CFR 602.10b(a)(1) and 8 CFR 214.2(h)(3)(i), respectively.

The sole statutory authority for promulgating the adverse effect rates drawn into question in these two cases clearly is lodged in the Immigration and Nationality Act at 8 U.S.C.A. 1184. See *The Elton Orchards Inc. v. Brennan, supra.* Subparagraph (a) of 1184 grants broad discretion to the Attorney General in establishing the requirements for admission of any alien as a non-immigrant (temporary foreign worker) by providing that any admission ". . . shall be for such time and under such conditions as the Attorney General may by regulations prescribe . . ." The phraseology which the Attorney General has used in his regulation—adversely affect—has been followed up by the Secretary of Labor in executing has responsibility to determine ". . . rates necessary to prevent adverse effect upon U.S. workers. . . ." (26 CFR 602.10b(a)(1)). The rulemaking objective is to neutralize the "adverse effect" upon domestic workers that may result from an influx of temporary foreign workers. It is designed to negate any

resultant wage deflation that the *presence* of those temporary foreign workers will otherwise produce. The view pressed by plaintiff Williams goes beyond this and proffers the position that the wage rate should be high enough to "attract" domestic workers.

Accordingly the Court concludes that neither the statute nor the regulations contemplate the establishment of an adverse effect rate at the level which plaintiff contends would *attract* domestic workers.

9. Plaintiff Williams also seeks to require the Secretary of Labor to make a determination of "prevailing wage rates" for sugar cane cutters. He contends that such a prevailing rate would be higher than the adverse effect rate. If so, this higher rate would have to be paid by the growers receiving certifications for temporary foreign workers pursuant to the regulations at 20 CFR §602.10b(b). This request proceeds upon the mistaken assumption that the average hourly earnings of sugar cane cutters during the 1974-1975 season, which was $3.03 per hour, is a "prevailing rate." This proposition confuses the meaning of "prevailing rate" with that of "average earnings." The $3.03 figure is a statement of average earnings not a statement of the prevailing rate.

The parties stipulated to the Secretary of Labor's definition of prevailing wage rate appearing in Part P of the United States Employment Services' Employment Security Manual:

> *Prevailing Wage Rate.* The *wage rate* or rates, including bonuses promised and earnings guarantees, which most adequately represent(s) the *wages paid, to domestic agricultural workers* in a wage-finding class of activity, in a specified area of employment. The rate is ascertained by a formula,

> prescribed by the Secretary of Labor, applied to the field data obtained by the State employment secruity agency involved or the Bureau of Employment Security. . . .

There was no evidence presented by the plaintiff that any wage rate "prevails" among domestic workers in the task of sugar cane cutting. The parties did stipulate that the Secretary of Labor has not made a prevailing wage rate determination among domestic workers. Plaintiff did not show any affirmative requirement in the statute or regulations that require the Secretary of Labor to obtain a prevailing wage rate under circumstances present in this case.

The testimony of the Vice President of the United States Sugar Corporation, a representative of the Florida Sugar Cane League, Inc., established that the custom and practice in the industry does not utilize a single piece rate. Multiple rates are paid according to an arbitrary dollar figure per row based upon an estimate of how long it will take the sugar cane cutter to cut a particular row. It is apparent, therefore, that there is no prevailing piece rate, but rather multiple row rates based upon a method of estimating the yield and the difficulty of cutting the row. Thus the rate an individual cane cutter is *paid* per row may bear no cognizable relationship to the wage *earned*.

Hence there is a failure of proof that any applicable prevailing wage rate exists.

10. Plaintiff Williams next contends that the Secretary of Labor should be required to apply the wage provisions established in 20 CFR §602.10b(e). That section provides:

> Upon application to, and approval by the Secretary of Labor in each case, an agricultural

> employer may use piece rates which are designed to, and do, produce earnings by his employees . . . the average of which for the weekly or bi-weekly period is 25% higher than the hourly rates applicable under paragraph (a) of this section for agricultural workers.

This provision is permissive; it may not be arbitrarily imposed by the Secretary. Furthermore, plaintiff has introduced no evidence that any employer has sought to use the optional pay system permitted by this regulation, nor has there been any evidence introduced that any employer who might have used this pay plan failed to pay the 25% increase. Accordingly, there has been a failure of proof and there is no basis for affording relief under this provision.

11. Plaintiff Williams' last attack upon the certification issued by the Secretary of Labor asserts that because the adverse effect rate of $2.84 per hour was made effective August 12, the Secretary's determination of nonavailability of domestic workers was invalid. Plaintiff relies upon 20 CFR §602.10(b) which provides in pertinent part:

> Such offers of employment, as well as any request for certification for temporary foreign workers, should be filed at the local office in sufficient time to allow the Manpower Administration 30 days to determine the availability of domestic workers. . . .

This provision of the regulation is a requirement which the Secretary *may* impose upon an employer seeking certification. It does not require the Secretary to delay action upon a request for certification when the Secretary has knowledge of availability or non-availability through his experience in the affected industry.

Here the Court observes that the testimony of plaintiff clearly establishes that he is not available for work at the $2.84 per hour rate and as an assumed representative of the alleged class it would follow that no member of his class is available for work as a sugar cane cutter at the $2.84 rate. Accordingly, there is a failure of proof on the issue of availability not unlike the failure of proof in an earlier case in this District on this subject, occurring during the 1972 Florida sugar cane season. In *United Farm Workers Union, et al. v. Kleindienst, et al.*, Civil Action No. 72-1439 Civ. PF (S.D. Florida 1973), it was alleged that the sugar cane growers and the Secretary of Labor had failed to recruit available domestic workers in Texas for employment in the Florida sugar cane harvest. There Judge Fay found:

> In view of the existing pattern of difficulties in recruiting domestic laborers, however, and the requisite continuing availability, *and preference in awarding of, employment opportunities* to *those qualified domestic workers sincere in procuring and performing sustained employment during the harvest season*, it can only be concluded that plaintiffs established neither a showing of irreparable harm nor a likelihood of prevailing on the merits of this litigation. Accordingly, plaintiff prayer for a preliminary injunction is hereby denied. Order dated October 12, 1972 at pgs. 9, 10. [Emphasis supplied.]

This Court also concluded that the requirement of the Secretary of Labor that job orders remain open for domestic workers where certification is granted for temporary foreign workers is a reasonable method of preventing adverse effect upon domestic workers. This is in keeping with the purpose of the Immigration and Nationality Act to protect domestic workers while

"alleviating labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production." H.R. Rep. No. 1365, 82d Cong., 2d Sess. in 1952 U.S. Code Cong. and Admin. News, 1653, 1698.

It is clear that the Attorney General and the Secretary of Labor have attempted to meet the needs of both domestic employees and domestic employers in the absence of any clear cut statutory standards. The regulations and the procedures adopted appear reasonably suited for this purpose. The nature of the changes and relief sought by plaintiff Williams here would essentially alter the administrative custom and practice that has existed over the years. Overturning such a custom and practice by judicial decision has recently been denied by the United States Supreme Court:

> The changes suggested implicate so many policies and raise so many problems of a political, economic, and social nature that it is fit that the judiciary recuse itself. At times judges must legislate "interstitially" to resolve ambiguities in laws. But the problem of taking all or some alien commuters engaging in farm work out of the Act is not "interstitial" or as Mr. Justice Holmes once put it "molecular." It is a massive or "molar" action for which the judiciary is ill-equipped. *Saxbe v. Bustos*, ____ U.S. ____, 95 S.Ct. 272 at 281 (1974). (footnote omitted)

12. Plaintiff Williams has failed to show any irreparable injury or reasonable likelihood of success on the merits. Accordingly his motion for a preliminary injunction is denied.

13. Plaintiff Williams motion for leave to proceed *in forma pauperis* is granted.

DONE AND ORDERED this 16 day of September 1975.

/s/ Charles B. Fulton
Charles B. Fulton
Chief United States District
Judge

APPENDIX B

Andrew WILLIAMS, Individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

W. J. USERY, in his capacity as Secretary of Labor, United States Department of Labor, et al., Defendants-Appellees.

No. 75-3458.

United States Court of Appeals,
Fifth Circuit.

May 10, 1976.

Before DYER and CLARK, Circuit Judges, and KRAFT*, District Judge.

DYER, Circuit Judge:

This appeal, like the companion case of *Florida Sugar Cane League v. Usery*, 5 Cir. 1976, 531 F.2d 299, decided today, raises a number of objections to the Secreatry of Labor's basis for the determination of the "adverse effect wage rate" for sugar cane cutters in Florida. Williams, an American unemployed sugar cane cutter, argued unsuccessfully in the district court that

*Senior District Judge of the Eastern District of Pennsylvania sitting by designation.

the Secretary had set the rate too low. He contended that the Secretary had failed to follow certain mandatory procedures in the certification of no adverse effect upon domestic workers from the use of foreign workers. Within the same contours of review of administrative rule-making enumerated this day in *League, supra,* we find no error in the district court's denial of injunctive relief.

Like the Florida Sugar Cane League, Williams attacks the Secretary's method of computations in arriving at the $2.84 "adverse effect wage rate". Unlike the argument of the League that the Secretary had exceeded his authority by considering extrinsic criteria, Williams asserts the Secretary failed to exercise the authority imposed upon him to avoid adverse effects on the wages of American workers. He objects to the "adverse effect wage rate" itself ($2.84) as too low to attract domestic workers. Although Williams raised this issue in this case below, he did not raise it on appeal in the case *sub judice*. Instead, Williams raised it in his Amicus Curiae brief in *Florida Sugar Cane League v. Usery*, 531 F.2d 299 (5 Cir. 1976). Since the issue fits more logically within the confines of this opinion, we decide it here. Williams seeks to require the Secretary to: 1) determine "the prevailing wage rate" for sugar cane in Florida; 2) require growers utilizing a piece rate system to guarantee average hourly earnings 25 percent higher than the hourly rate otherwise required; and 3) establish a 30 day period of recruitment of domestic sugar cane cutters at the designated "adverse effect wage rate," prior to issuance of the certification for foreign labor.

[1] In our view these arguments are based on a misunderstanding of the nature of the regulatory

scheme authorized under the Immigration and Nationality Act, 8 U.S.C.A. §1101 et seq. Even if desirable, the Secretary has no authority to set a wage rate on the basis of attractiveness to workers. His authority is limited to making an economic determination of what rate must be paid all workers to neutralize any "adverse effect" resultant from the influx of temporary foreign workers. As we said in *League, supra,* "[n]either the statute nor the regulations establish a formula for the Secretary's computation of this 'adverse effect wage rate'." We there upheld the Secretary's computation arriving at the $2.84 adverse effect rate as a reasonable method of avoiding wage deflation.

[2] Williams' notion of a wage rate, high enough to attract those domestic workers not otherwise willing to work in sugar cane, jumps well beyond the discretionary authority of the Secretary. Clearly, his authority to insure against a lowering of wages is hardly synonomous with the affirmative power to raise wages which Williams here proposes. "Attractiveness" is the wrong test for measuring the Secretary's determination.[1] We agree with the district court that the regulations and procedures used by the Secretary, in the absence of specific statutory standards, appear reasonably suited to achieve the statutory purpose of guarding against a general wage deflation from the employment of foreign workers. Within this latitude of discretion, we can find no legal basis for imposing an obligation on the Secretary to set an "attractive" wage.

---

[1] By contrast, consider the Secretary of Agriculture's responsibility under the now defunct Sugar Act for determining "fair and reasonable wage rates." This distinct statutory standard was the responsibility of a different department under a different Act. See *Angel v. Butz*, 10 Cir. 1973, 487 F.2d 260, 262, for an explanation of that responsibility.

[3] The Secretary's regulations required that the "prevailing rate for crop activity in an area" be paid when it is higher than the "adverse effect rate". 20 C.F.R. §602.10b(b). Williams contends that the Secretary must necessarily determine the "prevailing wage rate" in order to know when it is higher than the "adverse effect rate". The Secretary claims that it is impossible to determine a "prevailing wage rate" for sugar cane in Florida. Williams' argument relies on figures showing sugar cane cutters' actual "average earnings", rather than a "prevailing wage rate". The term "prevailing wage rate" has a specific meaning, defined by the Secretary and stipulated to by Williams, namely, "the wages paid, to *domestic* agricultural workers" (emphasis added). The fact is, as conceded by Williams, that "100 percent (or nearly 100 percent)" of Florida sugar cane cutters are *foreign* workers. Thus it would seem obvious that the Secretary was correct in contending there is no way to determine a "prevailing wage rate" in Florida sugar cane.

Moreover, this particular "crop activity" uses a wage rate system incapable of yielding a "prevailing wage rate". In sugar cane there is no standard unit of production. Sugar cane piece rates are based on the row of cane cut, but each row varies in cuttage and other factors affecting difficulty in cutting. There is simply no evidentiary basis for requiring a survey to determine that rate. Williams has merely offered figures establishing the average earnings of Florida agricultural laborers in general. Such non-crop specific data clearly cannot substitute for "the prevailing rate for a crop activity". The district court correctly held that Williams failed to prove any duty by the Secretary to determine this rate under these circumstances.

[4] Williams' argument that 20 C.F.R. §602.10b(e) of the regulations[2] requires the Secretary to increase the adverse effect wage rate by 25% suffers from a similar failure of proof. This regulation is permissive; it allows a particular pay system namely a piece rate wage, *at the option of the employer.* The regulation's 25% increase applies *only* upon the affirmative act of the employer. This provision clearly does not apply in every instance of payment by a piece rate rather than by an hourly rate.

Nowhere is there a requirement that piece rates be in *excess* of the adverse effect minimum wage. Rather, the regulations state that these piece rates be designed to produce the *equivalent* of the adverse effect wage rate: 20 C.F.R. §602.10b(a)(2) guarantees that whatever the piece rate wage, it shall in no event amount to less than the wage at the hourly rate.[3] This latter provision

---

[2] 20 C.F.R. §602.10b(e) provides:

(e) Upon application to, and approval by, the Secretary of Labor in each case, an agricultural employer may use piece rates which are designed to, and do, produce earnings by his employees engaged in the type of work covered by the job offer or contract, the average of which for the weekly or biweekly period is 25 percent higher than the hourly rates applicable under paragraph (2) of this section for agricultural workers. Should the average of the hourly earnings of such employees fall below this requirement, each worker's earnings for each payroll period within such weekly or biweekly period must be increased by the percentage needed to bring the total average to this requirement.

[3] 20 C.F.R. §602.10b(a)(2) provides:

(2) Piece rates shall be designed to produce hourly earnings at least equivalent to the hourly rate specified in subparagraph(1) of this paragraph for the State in which the work is to be performed and no workers shall be paid less than the specified hourly rate.

provides complete protection against Williams' expressed fear that growers would use the piece rate as a subterfuge to defeat the guaranteed hourly earnings requirement. The usual piece rate wage under §602.10b(a)(2) and the special 25% increased piece rate wage under §602.10b(e) are not interchangeable. The significant difference of (e) from (a)(2) is that (e) does not contain (a)(2)'s requirement that each individual worker receive at least the minimum wage of the "adverse effect wage rate." In the (e) piece rate system, it is the overall average earnings of the employees involved which is guaranteed to be 25% higher than the hourly rate. The individual worker is not guaranteed that his own wage will be 25% higher unless he cuts a sufficient number of pieces of sugar cane. This is his "incentive" to cut as much as he can as fast as he can.

Furthermore, the district court correctly found that Williams failed to show evidence of any employer seeking to use this special pay system. In fact the parties stipulated that the Secretary had "not received any employer request under the provisions of 20 C.F.R. §602.10b(e)." The district court properly refused to apply the (e) provisions to the sugar cane cutters.

[5] Finally, Williams would have us invalidate the Secretary's determinations because he did not wait thirty days to allow interstate recruitment of domestic laborers prior to acting upon the request for certification of the need for foreign laborers. Williams argues that this delay is required by the regulation, 20 C.F.R. §602.10(b).[4] But this misreads the regulation. The

[4] 20 C.F.R. §602.10(b) provided in relevant part:

> . . . Such offers of employment, as well as any request for certification for temporary foreign workers, should be filed at the local office in sufficient time to allow the Manpower Administration 30 days to determine the availability of domestic workers, in addition to the time necessary for the employer to secure foreign workers by the date of need if the certification is approved.

requirement applied to the employer rather than the Secretary. The Secretary *may* require the employer to file his request in advance of the date of need for his specific job, so as to facilitate the Secretary's initial task of determining the availability of domestic workers. The time *may* well be needed to find out this information, when the Secretary has had no prior knowledge of the particular industry.

We note that domestic laborers will in no way be deprived of their right to work by this certification procedure. Even after certification of the need for foreign laborers is granted, job offers must still be kept open for domestic laborers. If additional domestic laborers can be recruited by use of the clearance system, even after foreign laborers have arrived in the country, all such domestic workers will be given employment preference. 20 C.F.R. §602.10(d)(2).

AFFIRMED.

APPENDIX C

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

June 8, 1976

TO ALL COUNSEL OF RECORD

No. 75-3458–Andrew Williams, etc. v. W. J. Usery, etc., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/Susan M. Gravors
Deputy Clerk

/smg

cc: Mr. Bill Abbuehl
Mr. Michael Masinter
Ms. Katherine Gruenheck
Messrs. Carl W. Gerig, Jr.,
Steven Guttell
Mr. B. Franklin Taylor
Mr. Rex Young
Mr. Charles Kelso

APPENDIX D

1. 8 U.S.C. §1101(a)

As used in this chapter–

* * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens–

* * * *

(H) an alien having a residence in a foreign country which he had no intention of abandoning . . .

* * * *

(ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country;

2. 8 U.S.C. §1182(a)

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * *

(14) Aliens seekings to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or

unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a) (27) (A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a) (3) and 1153(a) (6) of this title, and to nonpreference immigrant aliens described in section 1153(a) (8) of this title;

3. 8 U.S.C. §1184(c)

The question of importing any alien as a nonimmigrant under section 1101(a) (15) (H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

4. 29 U.S.C. §49 *et seq.* (pertinent text only):

a. §49. United States Employment Service; bureau established; transfer of records, employees, etc., of existing employment service

In order to promote the establishment and maintenance of a national system of public employment

offices there is created a bureau to be known as the United States Employment Service.

b. §49b. Employment offices; development of national system; veterans' service; "State" defined

(a) It shall be the province and duty of the bureau to promote and develop a national system of employment offices for men, women, and juniors who are legally qualified to engage in gainful occupations, including employment counseling and placement services for handicapped persons, to maintain a veterans' service to be devoted to securing employment for veterans, to maintain a farm placement service, and, in the manner hereinafter provided to assist in establishing and maintaining systems of public employment offices in the several States and the political subdivisions thereof in which there shall be located a veterans' employment service. The bureau shall also assist in coordinating the public employment offices throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency, assisting them in meeting problems peculiar to their localities, promoting uniformity in their administrative and statistical procedure, furnishing and publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the several States.

(b) Whenever in sections 49 to 49c, 49d, 49g, 49h, 49j, and 49k of this title and section 338 of Title 39 the word "State" or "States" is used, it shall be understood to include Puerto Rico, Guam, the District of Columbia, and the Virgin Islands.

5. 8 C.F.R. §214.2(h)(3) (pertinent text only):

Petition for alien to perform temporary service or labor–(i) *Labor certification.* Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a) (15) (H) (ii) of the Act. A certification by the Employment Service of the Territory of Guam will be accepted in lieu of that issued by the Secretary of Labor or his designated representative in connection with a petition for employment of laborers in Guam. If there is attached to the petition a notice from the Secretary of Labor or his designated representative that certification cannot be made, the petitioner shall be permitted to present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed. All such evidence submitted will be considered in the adjudication of the petition.

6. 20 C.F.R. §§602-602.10b (pertinent text only):

a. §602.2 Placement services.

(a) *Functions.* Each State Agency shall maintain, through its State and local employment offices, a placement service for the free use of employers, workers, and veterans and for the purpose of assisting

employers to secure the number of workers possessing the occupational qualifications such employers require, and of assisting all workers to find promptly, jobs for which they are occupationally qualified and which are most advantageous to them. The State service shall promote the full use of its placement facilities, for the purpose of assuring the maximum of job opportunities for veterans and other workers and the maximum recruitment and placement assistance for employers.

* * * *

(c) *Inter-area and interstate clearance of labor.* Each State agency shall cooperate with the United States Employment Service in the interstate recruitment and transfer of workers. Each State agency shall maintain an adequate system for the recruitment and transfer of workers between areas within the State.

* * * *

b. §602.8 Agricultural and related industry placement services.

(a) Each State agency, in carrying out the provisions of the Wagner-Peyser Act, shall maintain, through its State administrative office and local employment offices, effective placement services for agricultural and related industry employers and workers, and such services shall include appropriate programs for the instrastate recruitment and transfer of workers and for cooperation with the United States Employment Service in the interstate recruitment and movement of workers.

c. §602.9 Interstate recruitment of agricultural workers.

No order for recruitment of domestic agricultural workers shall be placed into interstate clearance unless:

(a) The State agency has established pursuant to recruitment efforts made in accordance with regulations, policies and procedures of the ETA, that domestic agricultural workers are not available locally or within the State.

* * * *

d. §602.10 The certification processes.

(a) Section 214.2(h)(3) of the Immigration and Naturalization Service Regulations (8 CFR 214.2(h)(3) requires, in support of a petition for the admission of an alien to perform certain temporary service or labor, that

> Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a) (15) (H) (ii) of the Act.

* * * *

(b) Agricultural or logging employers including association employers anticipating a labor shortage may request a certification for temporary foreign labor, provided that the employer or the association and those of its members for whom the services of foreign workers are requested, prior to making such a request, have filed at the local office of the State employment service an offer of employment for U.S. workers to fill such employment needs in accordance with the provisions of this section and §§602.10a and 602.10b.

Such offers of employment, as well as any request for certification for temporary foreign workers, should be filed at the local office in sufficient time to allow the ETA 30 days to determine the availability of domestic workers, in addition to the time necessary for the employer to secure foreign workers by the date of need if the certification is approved.

(c) Request for certification shall be in writing and describe all efforts made by the employer to obtain U.S. workers to fill the employer's need.

(d) When received, the request for certification shall be forwarded by the local office of the State employment service to the appropriate RAETA together with information which indicate the extent to which the requirements set forth in this section have been met and a detailed report of labor availability, recruitment efforts undertaken by and on behalf of those requesting the use of foreign workers, and any other information required by the ETA. The RAETA may then issue the certification if he finds:

(1) That the employment of such workers will not adversely affect the wages and working conditions of domestic workers similarly employed; and

(2) That reasonable efforts have been and will continue to be made by the Employment Service and the employers to obtain domestic workers at wage rates and conditions of employment no less favorable than those set forth in the regulations in this part, to perform the work for which the services of temporary foreign workers are requested, and for which domestic workers are not available.

* * * *

e. §602.10b Wage rates.

(a)(1) Except as otherwise provided in this section, the following hourly wage rates (which have been found to be the rates necessary to prevent adverse effect upon U.S. workers) shall be offered to agricultural workers in accordance with §602.10a(j):

State:	*Rate*
Connecticut	$2.39
Florida (sugar cane only)	2.84
Maine	2.46
Maryland	2.36
Massachusetts	2.34
New Hampshire	2.58
New York	2.49
Vermont	2.54
Virginia	2.52
West Virginia	2.48

(2) Piece rates shall be designed to produce hourly earnings at least equivalent to the hourly rate specified in subparagraph (1) of this paragraph for the State in which the work is to be performed and no workers shall be paid less than the specified hourly rate.

(b) Where the prevailing rate for a crop activity in an area of employment is higher than the wage rate otherwise applicable under paragraph (a)(1) of this section, such higher prevailing rate shall be offered and paid.

* * * *

(e) Upon application to, and approval by, the Secretary of Labor in each case, an agricultural employer may use piece rates which are designed to, and do, produce earnings by his employees engaged in the type of work covered by the job offer or contract, the average of which for the weekly or biweekly period

is 25 percent higher than the hourly rates applicable under paragraph (a) of this section for agricultural workers. Should the average of the hourly earnings of such employees fall below this requirement, each worker's earnings for each payroll period within such weekly or biweekly period must be increased by the percentage needed to bring the total average to this requirement.

(f) Where both U.S. and foreign workers are engaged in the same tasks, wage rates that favor one such group and thereby discriminate against the other may not be paid.

FILED
DEC 2 1976
MICHAEL RODAK, JR., CLERK

No. 76-335

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANDREW WILLIAMS, PETITIONER

v.

W. J. USERY, JR., SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-335

ANDREW WILLIAMS, PETITIONER

v.

W. J. USERY, JR., SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 531 F. 2d 305.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1976. A petition for rehearing was denied on June 8, 1976. The petition for a writ of certiorari was filed on September 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion for a preliminary injunction

in an action filed by petitioner challenging a determination by the Secretary of Labor concerning the importation of temporary foreign agricultural labor and the effect thereof on wages and working conditions of domestic workers.

STATEMENT

In August 1975, the Secretary of Labor certified to the Commissioner of the Immigration and Naturalization Service that there were not sufficient domestic workers available to cut sugar cane in Florida and that the temporary employment of foreign workers at a rate of no less than $2.84 per hour would not adversely affect the wages and working conditions of domestic workers similarly employed.

The Secretary's certification was issued pursuant to the Immigration and Nationality Act, 66 Stat. 163, 168, 189, as amended, 8 U.S.C. 1101(a)(15)(H)(ii), 1184(a) and 1184(c), and regulations promulgated thereunder. To briefly summarize the statutory and regulatory scheme, Section 1101(a)(15)(H)(ii) provides that the term "immigrant" shall not include an alien who does not intend to abandon his foreign residence and "who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." Section 1184(a) provides that the admission of nonimmigrant aliens to this country shall be under "such conditions as the Attorney General may by regulations prescribe." Section 1184(c) provides that "[t]he question of importing any alien as a nonimmigrant * * * shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer."

By regulation the Attorney General has provided that every petition for the importation of nonimmigrant alien labor shall be accompanied by a certification by the Secretary of Labor or his designated representative that "qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed * * *." 8 C.F.R. 214.2(h)(3).

The Secretary of Labor has promulgated regulations governing the certification process. 20 C.F.R. 602.10. Before making a request for certification, an employer must "have filed at the local office of the State employment service an offer of employment for U.S. workers to fill such employment needs" at wages specified in the regulations; such offers "should be filed at the local office in sufficient time to allow the ETA 30 days to determine the availability of domestic workers * * *." 20 C.F.R. 602.10(b). Each request for certification must "describe all efforts made by the employer to obtain U.S. workers to fill the employer's need." 20 C.F.R. 602.10(c). Certification is authorized only upon a finding that the employer and the employment service will continue to endeavor to obtain domestic workers at wages and conditions as favorable as those offered to the foreign workers. 20 C.F.R. 602.10(d).

The Secretary has established wage rates that are "necessary to prevent adverse effect upon U.S. workers" and that must be paid to the temporary alien workers. 20 C.F.R. 602.10b. The regulations set forth a minimum hourly rate for agricultural workers in various States ($2.84 for Florida cane workers), permit piece rates so long as no worker earns less than the hourly rates, allow special piece rates that are designed to and do produce

earnings "the average of which for the weekly or bi-weekly period is 25 per cent higher than the hourly rates,"[1] and provide that when the "prevailing rate" in an area is higher than the specified hourly rate, the prevailing rate shall apply. 20 C.F.R. 602.10b.

In August 1975, the Secretary set the current hourly "adverse effect" wage rate for Florida sugar cane workers by adjusting the 1974 rate[2] upward 16 percent to reflect the increase in Florida's agricultural wages for the year reported by the United States Department of Agriculture. See *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299 (C.A. 5). Before that time, Florida cane growers made extensive efforts to recruit domestic cane cutters at $2.60 per hour, but obtained only 32 workers out of an anticipated 9,000 needed. As the district court found, the growers have continued their domestic recruiting efforts at the $2.84 rate (Pet. App. 3a-5a.)

After the Secretary's certification to the Commissioner of the Immigration and Naturalization Service, petitioner, a United States citizen and an unemployed migrant farm worker, filed a civil suit in the United States District

[1]Thus, if an employer elects to use the special piece rate, the *average* earnings of his employees must be at least 25 percent more than the specified hourly rate, although some employees may actually earn less than the specified hourly rate. An employer is not required to use the special piece rate, and the parties here have stipulated that no employer has applied to use the special rate.

[2]The 1974 rate was a minimum wage established by the Secretary of Argiculture under the Sugar Act of 1948, 61 Stat. 922, as amended, 7 U.S.C. 1100 *et seq.*, which expired at the end of the 1974 season. The Florida Sugar Cane League, Inc., an employer association, unsuccessfully challenged the authority of the Secretary of Labor to use this rate as a base. See *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299 (C.A. 5).

Court for the Southern District of Florida challenging the Secretary's certification and seeking to enjoin the INS from issuing any nonimmigrant worker visas pursuant to it.[3] Specifically, petitioner sought to require the Secretary to (1) determine the "prevailing wage rate" for sugar cane cutters in Florida; (2) require growers utilizing a piece rate system to guarantee hourly earnings 25 percent above the "adverse effect wage rate" or the "prevailing wage rate," whichever is higher; and (3) establish a 30-day recruitment period for domestic workers at the designated "adverse effect wage rate," before the Secretary's certification for foreign labor. Petitioner testified at the district court hearing on his motion for preliminary injunction that he was not interested in cutting cane at $2.84 an hour "but would consider cutting cane at $3.50 per hour" (Pet. App. 4a).

Following an evidentiary hearing, the district court found that petitioner "ha[d] failed to show any irreparable injury or reasonable likelihood of success on the merits" and denied his motion for a preliminary injunction (Pet. App. 12a). The court of appeals affirmed (Pet. App. B).

ARGUMENT

1. The only contention petitioner presses here is that the statutes and regulations require that the adverse effect wage rate be set sufficiently high to attract enough domestic workers to meet the employer's needs and thus, presumably, to preclude entirely the importation of foreign agricultural labor. The court of appeals properly rejected that contention.

[3]As noted above, n. 2, *supra*, prior to the promulgation of the adverse effect rate, the Florida Sugar Cane League, Inc., filed suit to enjoin the final promulgation of the proposed rate as too high.

The purpose of Congress in permitting the importation of temporary nonimmigrant labor was to find some means of "alleviating labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production,"[4] while at the same time ensuring that jobs would not be taken away from willing domestic workers. Congress obviously did not intend to require the government or the employer to prove that no domestic worker would perform the service at *any* price, but intended only to require reasonable efforts to obtain domestic workers under reasonable conditions.[5] Otherwise, Congress' manifest intent to permit importation of foreign workers under some circumstances would be nullified.

The regulations promulgated by the Attorney General and the Secretary of Labor ensure that those requirements are met and, further, that the importation will not adversely affect domestic wage scales. The record developed by the district court reflects that those conditions were satisfied in this case.

The Secretary's directive under 8 C.F.R. 214.2(h)(3) to ensure that domestic wages and working conditions are not adversely affected by the importation of foreign workers clearly does not authorize him to raise wages to a level irresistible to domestic employees. As the court of appeals stated (Pet. App. 3b):

---

[4]H.R. Rep. No. 1365, 82d Cong., 2d Sess. 45 (1952).

[5]The cases cited by petitioner (Pet. 9-10) are not to the contrary. Moreover, those cases are concerned with standards for the admission of permanent immigrant workers under 8 U.S.C. 1182(a)(14) and not, as here, the admission of temporary nonimmigrant workers.

> Even if desirable, the Secretary has no authority to set a wage rate on the basis of attractiveness to workers. His authority is limited to making an economic determination of what rate must be paid all workers to neutralize any "adverse effect" resultant from the influx of temporary foreign workers. As we said in [*Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299, 301 (C.A. 5)], "[n]either the statute nor the regulations establish a formula for the Secretary's computation of this 'adverse effect wage rate.'" * * *
>
> [Petitioner's] notion of a wage rate, high enough to attract those domestic workers not otherwise willing to work in sugar cane, jumps well beyond the discretionary authority of the Secretary. Clearly, his authority to insure against a lowering of wages is hardly synonomous with the affirmative power to raise wages which [petitioner] here proposes. "Attractiveness" is the wrong test for measuring the Secretary's determination. [Footnote omitted.]

2. Petitioner has failed to show any irreparable injury by reason of the Secretary's certification. As the district court (Pet. App. 11a) and the court of appeals (Pet. App. 7b) noted, 20 C.F.R. 602.10(d)(2) imposes a continuing duty on employers to recruit domestic workers and grants such workers employment preferences even after the temporary foreign workers have been hired. In view of the absence of irreparable injury and petitioner's failure to demonstrate the Secretary's noncompliance with the statutes and regulations, the district court did not abuse its discretion in denying preliminary injunctive relief.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys.

DECEMBER 1976.

DOJ-1976-12

Supreme Court, U. S.
FILED
NOV 16 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-335

ANDREW WILLIAMS,
Petitioner,

vs.

WILLIAM J. USERY, et al.,
Respondents,

and

FLORIDA SUGAR CANE LEAGUE, INC.,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE INTERVENOR, FLORIDA SUGAR CANE LEAGUE, INC., IN OPPOSITION TO THE PETITION FOR CERTIORARI

JOHN BACHELLER, JR.
CHARLES KELSO
FISHER & PHILLIPS
3500 First National Bank Tower
Atlanta, Georgia 30303
Counsel for Intervenor, Florida Sugar Cane League, Inc.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

STATEMENT OF THE CASE 2

ARGUMENT AND CITATION OF AUTHORITY 7

Point One—The Immigration Act Does Not Require and the Secretary of Labor Is Not Authorized to Set an Adverse Effect Rate Which Will Make Cutting Sugar Cane "Attractive" to American Workers 7

Point Two—Setting the Adverse Rate According to Petitioner's "Attractiveness" Theory Would Have the Effect of Obviating the Need for Foreign Workers, Contrary to Congressional Intent in Establishing a Scheme Permitting Their Use and Contrary to Long-Established Agency Practice 11

Point Three—The Issue Which Petitioner Raises Involves Novel Interpretation of Long-Standing and Consistently Applied Departmental Regulations and Procedures Which Are in Accord With Congressional Intent. No Special or Important Reasons Exist Which Justify Granting His Petition for a Writ of Certiorari 13

CONCLUSION 14

Authorities Cited

Cases

Acupuncture Center of Washington v. *Brennan*, 364 F.Supp. 1038 (D. D.C. 1973), *aff'd*, ... F.2d ..... (D.C. Cir. 1976), *pet. for cert. filed*, 44 U.S.L.W. 3626 (U.S. April 15, 1976) (No. 75-1497) 13

Chemehuevi Tribe of Indians v. *F.P.C.*, 420 U.S. 395 (1975) 10, 13

Digilab, Inc. v. *Secretary of Labor*, 495 F.2d 323 (1st Cir. 1974) 13

The Elton Orchards, Inc. v. *Brennan*, 508 F.2d 493 (1st Cir. 1974) 3
Florida Sugar Cane League, Inc. v. *Usery*, 531 F.2d 299 (5th Cir. 1976) 1, 11
Golabeck v. *Regional Manpower Administration*, 329 F.Supp. 892 (E.D. Pa. 1971) 13
Massachusetts Trustees v. *United States*, 377 U.S. 235 (1964) 10
NAACP, Western Region v. *Brennan*, 360 F.Supp. 1006 (D. D.C. 1973) 4, 7
Ratnayake v. *Mack*, 499 F.2d 1207 (8th Cir. 1974) 13
Saxbe v. *Bustos*, 419 U.S. 65, 74 (1974) 10, 13
Seo v. *United States Department of Labor*, 523 F.2d 10 (9th Cir. 1975) 13
Shuk Yee Chan v. *Regional Manpower Administrator*, 521 F.2d 592 (7th Cir. 1975) 13
Thorpe v. *Housing Authority*, 393 U.S. 268 (1969) 11
United States v. *Midwest Oil Co.*, 236 U.S. 459 (1915) 10
Williams v. *Usery*, 531 F.2d 305 (5th Cir. 1976) 6, 7, 8

STATUTES

Immigration and Naturalization Act—
8 U.S.C. Section 1182(a)(14) 3, 12
8 U.S.C. Section 1184(c) 2, 3, 8, 12

REGULATIONS

8 CFR Section 214.2(h)(3) 2, 4
20 CFR Section 602.10, *et seq.* 2, 3, 4
29 CFR Section 60.6 3

MISCELLANEOUS

111 Cong. Rec. 24230-24231 (1965) 10
H. R. Rep. No. 1365, 82d Cong., 2d Sess. (1952) 12

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-335

ANDREW WILLIAMS,
Petitioner,
vs.
WILLIAM J. USERY, et al.,
Respondents,
and
FLORIDA SUGAR CANE LEAGUE, INC.,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE INTERVENOR, FLORIDA SUGAR CANE LEAGUE, INC., IN OPPOSITION TO THE PETITION FOR CERTIORARI

Intervenor, FLORIDA SUGAR CANE LEAGUE, INC., respectfully prays that the Supreme Court of the United States deny a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-styled case on May 10, 1976, reported at 531 F.2d 305. (*See also* companion case *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F.2d 299 (5th Cir. 1976).)

STATEMENT OF THE CASE

Each year during the peak winter harvest period in Florida, Intervenor's members find it necessary to import West Indian sugar cane cutters to harvest their crops. Under the Immigration and Naturalization Act (8 U.S.C. 1184 (c)) and regulations promulgated thereto (8 C.F.R. § 214.2 (h)(3) and 20 C.F.R. § 602.10, *et seq.*), these temporary foreign agricultural workers are permitted to enter and perform work in this country after it has been ascertained that their presence will not depress the wages of domestic harvest laborers in Florida. Despite the fact that cane cutter jobs pay a guaranteed minimum wage and average piece rate earnings higher than those prevailing in Florida, including those paid to citrus workers, and despite an extensive advertising and recruitment campaign throughout Florida and the Southeast United States, few American cane cutters can be recruited. Petitioner Migrant Legal Action Program, Inc. opposes even the concept of a foreign labor program and here seeks to have the Secretary of Labor directed to raise required wage rates far above prevailing wage rates until American workers claim all jobs and all foreign workers are eliminated. Petitioner's position is clearly contrary to Congress' purpose as set forth in the Immigration and Naturalization Act.

Regulatory Scheme

Under Section 1184(c) of the Act, and the regulations promulgated pursuant to it, the Attorney General of the United States is directed to establish the terms and conditions under which temporary workers may be imported after consulting with other agencies. The regulation, at 8 C.F.R. 214.2(h)(3), directs the Secretary of Labor to determine and certify to the Attorney General that domestic

workers are not available and that the importation of foreign workers will not adversely affect domestic workers similarly employed before the foreign cane cutters are permitted to enter the country. *See The Elton Orchards, Inc.* v. *Brennan*, 508 F.2d 493 (1st Cir. 1974).

In order to ensure that domestic workers will not be adversely affected by importation of temporary foreign workers, the Secretary of Labor has, by long-standing regulation, at 20 C.F.R. § 602.10, *et seq.*, required that employers who petition to obtain certification for foreign workers first offer the jobs to American workers at rates of pay which are sufficiently high to prevent an adverse effect on similarly employed domestic workers and continue to employ qualified Americans even after foreign workers have been employed.

Neither the statute nor the regulations establish any formula for computation of "an adverse effect rate," and accordingly, the determination of the "adverse effect rate" is addressed to the sound discretion of the Secretary. He annually determines for each state where temporary workers are likely to be requested, the hourly rates of pay which will be required in order to prevent a general reduction in wages for agricultural workers. The adverse rate determination for each year is tied to the average or the prevailing hourly wage rate actually received by the state's agricultural workers during the previous season, and the adverse rate is determined by a mathematical formula.

The statutory and regulatory scheme for certification of nonimmigrant temporary agricultural workers under 8 U.S.C. § 1184(c) is similar to the statute and regulations under which immigrant aliens are admitted permanently for the purpose of performing skilled or unskilled labor in the United States pursuant to 8 U.S.C. § 1182(a)(14) and the regulations issued thereunder at 29 C.F.R. § 60.6:

> [P]rospective employment offered in accordance with Section 60.3(c) will be deemed to *adversely affect 'wages' or 'working conditions'* of American workers within the meaning of Section 12(a)(14) of the Act *unless* it appears: (a) that such employment will be for the wage rates no less than those prevailing for U. S. workers similarly employed in the area of employment. . . . (Emphasis supplied.)

As described above, the regulation pertaining to certification of *temporary* foreign agricultural workers contains an identical requirement that "the employment of the beneficiary [the foreign worker] will not adversely affect the wages and working conditions of workers in the United States similarly employed. . . ." 8 C.F.R. § 214.2(h)(3) and 20 C.F.R. § 602.10(a). Therefore, in *NAACP, Western Region* v. *Brennan*, a case involving importation of temporary farm workers, the Court stated that:

> [T]he adverse effect rate should be set high enough to ensure that earnings of domestic workers are not depressed by the presence of foreign workers.

360 F.Supp. 1006, 1020 (D. D.C. 1973).

In the case of permanent immigrants, the Secretary of Labor has always issued the required certification if the rates at which the jobs were offered to American workers were no lower than the average, i.e., the prevailing, rates paid to workers in similar positions. In the case of temporary nonimmigrant sugar cane workers, the adverse rate has always been set slightly higher than the average rate paid to similarly employed domestic workers. Thus, under both systems, it is clear that the Secretary has always set the adverse effect rate at a level which is calculated in such a manner as to preclude any adverse effect on the wages paid to similarly employed American workers.

Wages of Sugar Cane Cutters

At present and during all pertinent times, Florida sugar cane workers' minimum guaranteed rate has been in excess of the average hourly rate being paid other Florida agricultural workers, including the rate paid to citrus workers. Thus, use of temporary foreign workers has never adversely affected the wages of domestic agricultural workers.

The Secretary used a mathematical formula to project the 1974-75 guarantee of $2.45 per hour for cane cutters based on the previous year's guaranteed minimum hourly rate for all Florida agricultural workers.

The 1974-75 harvest season wage rates were the rates on which the $2.84 per hour rate for 1975-76 was based. During 1974-75, sugar cane workers were paid a *guaranteed minimum* of $2.45 per hour plus free housing. At the same time the prevailing hourly rate for all Florida agricultural workers, including highly paid supervisors and machine operators, was $1.98 without room and board or $1.69 if free housing was provided. During the same period, the *average hourly piece rate earnings* based on incentive pay plans, was $3.03 per hour for sugar cane cutters (*excluding* supervisors and equipment operators) and $2.94 for all Florida agricultural workers (*including* higher paid supervisors and equipment operators). Because Florida sugar cane cutters are and always have been paid in excess of the prevailing hourly rate, it is clear that importation of temporary foreign workers has not had the effect of depressing farm wages in Florida or in other states where the Secretary of Labor has made these calculations.

The Brief of the Petitioner (*see* fn. 14) notes that sugar cane cutters' incentive piece rate earnings exceed

their minimum guaranteed hourly rate. When the guaranteed minimum was $2.45 per hour, the average incentive earnings were $3.03 per hour. When the Secretary increased the guarantee to $2.84, the incentive earnings increased to average $3.59 per hour.

It is, of course, not at all odd that piece rate incentive earnings exceed the guaranteed minimum, *i.e.*, the adverse effect rate. Petitioner simply misses the point that if the incentive rate is guaranteed, the purpose of having an incentive rate—to encourage production—is lost. The Court of Appeals, however, did not miss this point. *Williams* v. *Usery*, 531 F.2d 305, 308 (5th Cir. 1976).

At all times the adverse effect rate applicable to cane cutters has exceeded both the hourly guaranteed rates and the piece rates of all other Florida agricultural workers.

As noted by the Court below, with a minimum guaranteed hourly wage rate of $2.84, sugar cane cutters earn substantially more than do other Florida agricultural workers. Further, the fact that the presence of foreign workers cannot be said to affect adversely domestic workers' wages is even more abundantly clear when the average *actual* earnings of sugar cane cutters and other farm employees are compared. The average incentive piece rate results in average actual earnings for Florida agricultural workers of $3.49 per hour. That is ten cents per hour less than the average incentive piece rate of cane cutters whose earnings are $3.59 per hour.

It is undisputed that Florida sugar cane growers have in the past sought or that they continue to seek domestic employees. They have always offered pay rates above the prevailing rates paid to other Florida farm workers, but there are insufficient domestic workers in Florida during the peak winter harvest season who are willing to

harvest the cane. Because there are insufficient willing domestic workers, the growers must employ foreign workers. This is exactly the situation in which the Immigration and Naturalization Act authorizes the use of foreign workers.

By specifying that the minimum wage rate to cane cutters must be $2.84 per hour, clearly far higher than the rates averaged by Florida agricultural workers, the Secretary of Labor has met his duty to see that there is no adverse effect on other Florida agricultural workers.

ARGUMENT AND CITATION OF AUTHORITY

Point One

The Immigration Act Does Not Require and the Secretary of Labor Is Not Authorized to Set an Adverse Effect Rate Which Will Make Cutting Sugar Cane "Attractive" to American Workers.

The decision below is in accord with Congressional intent as expressed through statements of sponsoring legislators, agency enforcement and court interpretation of the Immigration Act and the regulations promulgated by the Secretary of Labor under the Act. The Fifth Circuit Court of Appeals held that the authority of the Secretary of Labor is limited to making an economic determination of what rate must be paid to all sugar cane workers in order to neutralize any adverse effect which might otherwise result from the influx of temporary foreign workers. *Williams* v. *Usery*, 531 F.2d 305, 306 (5th Cir. 1976), and no court has ever held otherwise. *See NAACP, Western Region* v. *Brennan*, 360 F.Supp. 1006, 1020 (D. D.C. 1973).

As stated by the *Williams* court, Petitioner Williams' notion that the adverse effect rate must be set higher and higher until American workers claim all sugar cane cutting jobs is a proposition well beyond the discretionary authority of the Secretary. The court distinguished the authority given to the Secretary to ensure against a lowering of wages from affirmative power to raise wages to make cutting sugar cane an irresistibly attractive job.

The standard followed by the Secretary in determining adverse wage rates has always been to select a wage rate which would guard against a general wage deflation because of employment of foreign workers.

By setting the adverse effect rate above the prevailing rate, which is the average hourly rate paid to Florida agricultural workers, the Secretary has always taken necessary steps to assure that importation of foreign workers has not depressed prevailing agricultural wage rates.

The Department's interpretation of its authority was approved by Congress when it amended the Immigration and Naturalization Act in 1965. At that time Congress debated whether Section 1184, the provision of the statute granting authority for admission of temporary foreign agricultural workers, still served a viable purpose, but a decision was made to keep the temporary foreign worker exemption in the Act. In fact, the legislative history reveals that the 1965 amendment in no way curtailed the right of Florida farmers to employ temporary foreign agricultural workers. On September 17, 1965, a colloquy took place on the Senate floor which establishes this fact conclusively:

> MR. KENNEDY of Massachusetts. The distinguished junior Senator from Florida [Smathers] . . . brought to my attention certain language that appears in the

> [Senate] report, pointing out to me that this was not the language that was agreed to by the Committee. Let me now read the language about which the Senator from Florida expressed concern:
>
> 'The attention of the Committee was directed to the situation which exists with reference to the practices and procedures controlling the importation of aliens to perform temporary services under Section 214(c) of the Immigration and Naturalization Act, both as it relates to the importation of actors and other performers and as it relates to other types of employment.
>
> 'The Attorney General will be requested to study this matter of consultation with the Secretary of Labor in those cases involving the importation of nonimmigrant aliens under Section 101(a)(15)(H)(i) and (ii) and report seasonably to the Committee the result of this study.' [Senate Report No. 748, 89th Cong., 1st Sess., *U. S. Cong. and Admin. News* 3345 (1965).]
>
> There is a clear understanding between myself and the junior Senator from Florida, and other members of the Committee with respect to this language that the Committee had no intention of including nonimmigrant farm labor in the language agreed to.
>
> I regret that this language is in such a form that it could be misconstrued and want to say very definitely now that the Committee makes *no change or reference to nonimmigrant farm labor* either in the report or the bill before us.
>
> The language that I have referred to is added to cover those temporary workers who accompany theatrical performers to assist them in their performances and again was not included to refer to nonimmigrant farm labor.

> MR. HART [Michigan]: I reassure the Senator from Florida that I heard the colloquy with respect to agricultural labor, and I share the view of the floor manager of the bill that *there is nothing*, in the new legislation which we hope will be enacted, *that would change existing laws or procedures with respect to the admission of migrants or anybody else. The same procedures and clearance requirements which exist today will remain after enactment of this bill.*

111 *Cong. Rec.* 24230-24231 (1965). (Emphasis supplied.)

Under established doctrines of this Court, the Department of Labor's interpretation of its authority should be upheld.

> Such long-standing administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched. Such a history of administrative construction and Congressional acquiescence may add a gloss or qualification to what is on its face unqualified statutory language. *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 12 L.Ed.2d 268, 84 S.Ct. 1236 (1964); *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 59 L.Ed. 673, 35 S.Ct. 309 (1915).

Saxbe v. *Bustos*, 419 U.S. 65, 74 (1974). *See also Chemehuevi Tribe of Indians* v. *F.P.C.*, 420 U.S. 395, 409-10 (1975) ("The deference due this long-standing administrative construction [of its statutory authority] is enhanced by the fact that Congress gave no indication of its dissatisfaction with the agency's interpretation of the scope of its jurisdiction when it amended the Act. . . .")

In accordance with these principles of deference to agency expertise and familiarity with the Act and the

problems faced by both employers and workers, the Fifth Circuit rejected Petitioner Williams' "attractiveness" theory and approved the $2.84 per hour adverse effect rate for 1975. That determination was held to be a proper exercise of the Secretary's rule-making authority "reasonably related to the purposes of the enabling legislation" under *Thorpe* v. *Housing Authority*, 393 U.S. 268, 280-81 (1969). *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F.2d 299 (5th Cir. 1976).

Point Two

Setting the Adverse Rate According to Petitioner's "Attractiveness" Theory Would Have the Effect of Obviating the Need for Foreign Workers, Contrary to Congressional Intent in Establishing a Scheme Permitting Their Use and Contrary to Long-Established Agency Practice.

The remarks by Senators Kennedy and Hart which are reproduced above clearly show that Congress recognized the need for temporary foreign workers in agriculture and did not intend to change the procedures or clearance requirements under Department of Labor Regulations.

When Congress passed the Immigration and Naturalization Act in 1952, it was recognized that the temporary foreign agricultural workers would be needed at times. If Florida sugar cane growers offer wages at or above the prevailing wages for agricultural harvest work in Florida during the peak winter harvest season and, nevertheless, cannot obtain sufficient domestic workers, there is a demonstrated need for the importation of foreign workers to alleviate "labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified

production." H. R. Rep. No. 1365, 82 Cong., 2d Sess. (1952) 2 *U.S. Cong. and Admin. News* 1698 (1952).

By contrast, Williams' "attractive rate" argument would make a nullity of Section 1184 by forcing the Secretary of Labor to set wages higher and higher until, finally, enough American workers are willing to cut sugar cane (or until the American sugar industry is priced out of the world market). Clearly, that result was not intended by Congress when it directed the Attorney General to consult with appropriate agencies and permit entry of temporary workers. The Congressionally approved standards presently in effect are an accommodation of the interests of workers, employers and consumers and should not be set aside by judicial proceedings.

The language of the comparable Section 1182(a) (14) states specifically that the Attorney General is to certify that there are not sufficient American workers who are able, *willing* and qualified and available to do the work which an alien seeks to perform permanently. Thus, by analogy, the regulations issued by the Secretary of Labor pursuant to the provision dealing with temporary foreign workers recognizes that foreign workers may be required because Americans simply are not willing to perform certain types of work. The statutory and regulatory authorization to the Secretary of Labor is not to see that irresistibly attractive wages for cutting sugar cane are offered but rather to see that wages paid to foreign sugar cane workers do not depress agricultural wages. To hold otherwise would effectively repeal the statutory authorization for use of temporary agricultural workers.

Point Three

The Issue Which Petitioner Raises Involves Novel Interpretation of Long-Standing and Consistently Applied Departmental Regulations and Procedures Which Are in Accord With Congressional Intent. No Special or Important Reasons Exist Which Justify Granting His Petition for a Writ of Certiorari.

The decision of the Court of Appeals that the Secretary of Labor is without statutory authority to set wage rates for sugar cane cutting at whatever rate is high enough to attact American workers is in accord with the long-standing Department of Labor Regulations and with the Immigration and Naturalization Act of 1952, as amended. This Court has many times stated that great deference is due agency determinations of the scope of their statutory authority. *Chemehuevi Tribe of Indians* v. *F.P.C.*, 420 U.S. 395, 409-10 (1975); *Saxbe* v. *Bustos*, 419 U.S. 65 (1974). No Court has ever accepted Petitioner's novel theory and there is no conflict in interpretation of the statute or of the regulations among the circuits. While the precise issue has never been addressed previously, decisions by other courts involving application of departmentally determined adverse effect rates have upheld the Labor Department's theory rather than that of the Petitioner. *See, e.g., Acupuncture Center of Washington* v. *Brennan*, 364 F.Supp. 1038, 1041 (D. D.C. 1973), *aff'd*, ... F.2d ..... (D.C. Cir. 1976), *pet. for cert. filed*, 44 U.S.L.W. 3626 (U.S. April 15, 1976) (No. 75-1497); *Seo* v. *United States Department of Labor*, 523 F.2d 10 (9th Cir. 1975); *Shuk Yee Chan* v. *Regional Manpower Administrator*, 521 F.2d 592, 596 (7th Cir. 1975); *Ratnayake* v. *Mack*, 499 F.2d 1207, 1210, 1213 (8th Cir. 1974); *Digilab, Inc.* v. *Secretary of Labor*, 495 F.2d 323 (1st Cir. 1974); *Golabeck* v. *Regional Manpower Administration*, 329 F.Supp. 892, 895 (E.D. Pa. 1971) and cases there cited.

CONCLUSION

For all of these reasons, no Writ of Certiorari should issue from this Court to review the judgment of the Fifth Circuit.

Respectfully submitted,

JOHN BACHELLER, JR.

CHARLES KELSO
FISHER & PHILLIPS
3500 First National Bank Tower
Atlanta, Georgia 30303
Counsel for Intervenor, Florida Sugar Cane League, Inc.